Supreme Court, U.S.
FILED
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(2)

No. 03-1189

IN THE

# Supreme Court of the United States

JAY L. LEVY, DDS,

*Petitioner*,

*v.*

P&R DENTAL STRATEGIES, INC., *et al.*,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT

## BRIEF IN OPPOSITION

PETER L. ALTIERI
*Counsel of Record*
ROBERT D. GOLDSTEIN
EPSTEIN BECKER & GREEN, P.C.
*Attorneys for Respondents*
250 Park Avenue
New York, NY 10177-0077
(212) 351-4500

186506

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## QUESTIONS PRESENTED

Whether Respondents were entitled to summary judgment dismissing Petitioner's common law claim for tortious interference with prospective economic advantage, where the undisputed facts demonstrated that: (a) Respondents' contract with one of their clients precluded the client from hiring Respondents' consultants for a limited period of time, (b) the client independently determined that it would honor that provision absent a waiver from Respondents, (c) Petitioner requested that Respondents waive that provision, and (d) Respondents declined Petitioner's request for a waiver?

Respondents objects to Petitioner's first and third Question Presented. With regard to Petitioner's first Question Presented, no constitutional issues were ever raised before the trial court or the Appellate Division and no claim of a constitutional violation was ever asserted in Petitioner's complaint. Thus, the Court should not consider that question. With regard to Petitioner's second Question Presented, Petitioner abandoned his antitrust claims before pursuing an appeal, and this appeal does not involve any issues regarding "freedom of the market." The Court therefore should not consider that question.

## CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent P&R Dental Strategies, Inc. does not have a parent corporation and there is no publicly held company that owns 10% or more of its stock.

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## INTRODUCTION

Petitioner Jay Levy ("Levy"), a former dental consultant for P&R, commenced this action in 1999 claiming that Respondents P&R Dental and its President Anthony Paciello (collectively, "P&R")[1] tortiously interfered with prospective business relations and committed antirust violations[2] by declining Levy's request that P&R waive a contractual provision in which one of P&R's clients agreed not to hire P&R consultants for a limited time period. This petition represents Levy's most recent attempt to revive his ill-advised lawsuit, which was properly dismissed by the trial court more than two years ago. The Supreme Court of the State of New York, Appellate Division (First Department) unanimously affirmed that dismissal and later denied Levy's motion for reargument and/or leave to appeal. Levy's subsequent attempt to have the New York Court of Appeals grant him leave to appeal was similarly rejected.

Levy now seeks the extraordinary relief of a Writ of Certiorari. In a desperate attempt to persuade this Court to grant him that Writ, Levy even misrepresents to the Court that he was denied discovery in the underlying action, although he knows perfectly well that he was given a full opportunity to take discovery — and that he completed all discovery — well before the trial court granted P&R's motion for summary judgment.

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1. Inexplicably, Levy refers to P&R as "P&G" throughout the Petition.

2. Levy abandoned his antitrust claims on appeal to the Appellate Division, choosing only to appeal dismissal of his claim for tortious interference with prospective economic advantage.

Levy also disingenuously mischaracterizes the issues on appeal. Levy's appeal was limited solely to the trial court's dismissal of his common law claim for tortious interference with a prospective contract. Yet, in a transparent attempt to invoke this Court's jurisdiction, Levy now tries to claim his appeal involves a constitutional deprivation, despite the fact that P&R is not a state actor and no constitutional claim was ever raised at the trial court level or with the Appellate Division. The only issue on appeal was the existence of a triable issue of fact regarding Levy's common law tortious interference claim. The trial court and the Appellate Division held unequivocally that there were no such factual issues and dismissed Levy's complaint based on longstanding, well settled New York law. The New York Court of Appeals similarly refused to even allow Levy to pursue a further appeal. There is no basis for Levy to now have the issue revisited yet again by this Court based on the false pretense of a constitutional issue.

## STATEMENT OF THE CASE

### 1. P&R's Contract With MetLife

P&R is a private medical consulting firm that provides independent reviews of claims for dental services submitted to P&R's clients, which consist of self-insured employers and insurance carriers. (R-15.)[3] Dr. Anthony Paciello is the President of P&R. (R-15.) In order to provide its clients with independent dental claims review services, P&R retains licensed dentists who serve as independent contractors to perform the claims reviews services for P&R. (*Id.*)

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3. References to the Record on Appeal are denoted as "R-__."

One of P&R's clients was Metropolitan Life Insurance Company ("MetLife"). On December 24, 1998, P&R and MetLife entered into a contract which provided that P&R would review claims for dental services submitted by MetLife's insureds (the "MetLife Contract"). (R-12-14). Paragraph 13 of the MetLife Contract provides:

> . . . MetLife agrees not to hire or employ any dental consultant that has a current contractual relationship to do MetLife Claim Review with P&R Dental Strategies, Inc. (or had a contractual relationship at any time during two years prior to termination of the agreement) for the duration of this agreement and two years subsequent to this agreement's termination.

(R-14.)

Paragraph 13 of the MetLife Contract is of paramount importance to P&R because its dental consultants constitute its single most important and valuable resource. (R-16-17.) The limited restriction set forth in the MetLife Contract is essential to prevent clients such as MetLife from retaining P&R for a short period of time and then, after its contract with P&R ends, raiding the P&R dental consultants who had become familiar with MetLife's claims procedures, policies, practices and requirements during the term of the contract. (R-16-17.)

## 2. Dr. Levy's Relationship with P&R

Dr. Levy was retained by P&R in or around May 1996 to perform independent claims review services for MetLife. (R-17.) At all times during Dr. Levy's relationship with P&R, Dr. Levy was an independent contractor providing part-time dental claims review services for P&R. (R-8, 26, 55 [Levy Dep. at p. 94, lines 18-23], 126.) Dr. Levy also maintained his own dental practice since March 1994, including the time period in which he provided claims review services for P&R.[4] (R-36 [Levy Dep. at p. 19, lines 13-20].)

In June 1999, the MetLife Contract was about to expire. In his complaint, Dr. Levy alleged that he approached MetLife on June 18, 1999 to seek employment as a dental claims review consultant for MetLife. (R-27.) Consistent with its contractual obligation to P&R, MetLife informed Levy that it would not hire him, pursuant to Paragraph 13 of the MetLife Contract, unless P&R agreed to waive that provision. (R-27, 60 [Levy Dep. at p. 116, lines 21-23; p. 117, lines 22-25], 127.) On or about June 23, 1999, Dr. Paciello met with Dr. Levy to discuss whether Dr. Levy wished to continue providing dental claims reviews services for P&R with respect to P&R's other clients. (R-128.) Dr. Levy declined P&R's offer, but did ask Dr. Paciello if P&R would waive the restriction in the MetLife Contract so he could seek a position directly at MetLife. (R-27.) P&R declined Levy's request for a waiver. (*Id.*)

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4. Levy's status as an independent contractor is undisputed. Indeed, Levy identified himself as an independent contractor in his complaint (R-26) and in his June 12, 2000 opposing affidavit. (R-126.)

### 3. The Commencement of This Action

Dr. Levy commenced this action against both P&R and Dr. Paciello on or about November 3, 1999. (R-30.) In his complaint, Dr. Levy asserted claims for tortious interference with contract, tortious interference with a prospective economic relationship, and violations of the Sherman Act and the Donnelly Act (New York State's antitrust statute). (R-25-30.)

On or about May 17, 2000, P&R moved to dismiss Dr. Levy's complaint for failure to state a cause of action pursuant to New York Civil Practice Law & Rules ("CPLR") §§ 3211(a)(1) and (7). (R-9-14.) On or about August 17, 2000, however, the trial court held that motion to dismiss in abeyance, lifted the automatic stay of discovery and directed the parties to complete discovery before it would rule on P&R's motion to dismiss. (That Order was omitted from the Record on Appeal prepared by Levy. *See* Appendix, at p. 5a.) The parties thereafter completed all discovery, including depositions. (R-31-119.)

On May 13, 2001, the trial court issued a decision denying that portion of P&R's motion brought under CPLR 3211(a)(1), and converting the balance of P&R's motion to one for summary judgment. (R-6.)[5] The trial court also gave the parties the opportunity to make further submissions in connection with P&R's summary judgment motion, and all parties, including Levy, submitted additional affidavits. (R-6; R-15-119; R-136-47.) At no time did Levy ever seek any additional discovery to oppose P&R's motion.

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5. The record on Appeal prepared by Levy does not contain the trial court's May 13, 2001 order. It is annexed hereto as Appendix B.

In a decision dated December 24, 2001, the trial court granted P&R's motion for summary judgment and dismissed the complaint in its entirety. (R-5-7.) Levy appealed that decision before the Appellate Division, First Department. (R-3-4.) However, Levy expressly limited his appeal to the trial court's dismissal of his claim for tortious interference with prospective economic relationship. (*See, e.g.*, Appendix to Petition, at p. 5a.) On February 18, 2003, the First Department unanimously affirmed the trial court's dismissal of Levy's tortious interference claim. (*Id.*) Levy thereafter submitted to the First Department a motion for reargument and/or leave to appeal to the Court of Appeals, which motion was denied on July 10, 2003. (Appendix to Petition, at p. 3a-4a.) Levy then made a motion to the New York State Court of Appeals, seeking to have this Court grant him reargument and/or leave to appeal to the Court of Appeals. That motion was denied on November 20, 2003. (Appendix to Petition, at p. 1a-2a.)

## REASONS FOR DENYING THE PETITION

### 1. LEVY HAD A FULL OPPORTUNITY TO CONDUCT DISCOVERY IN THE UNDERLYING ACTION

As a threshold matter, Levy's present Petition is based on a blatant misrepresentation to this Court that Levy was denied full discovery in the underlying action. (*See* Levy Petition, at pp. i, 4 and 5.)

In truth, Levy was not only afforded a full opportunity to conduct discovery in this action, but he actually conducted and completed discovery long before P&R was granted summary judgment. (*See* R-31-119, 130-31.)

P&R initially moved to dismiss the complaint pursuant to CPLR 3211 on May 18, 2000. (R-9-10.) At oral argument on P&R's motion before Justice Braun on August 17, 2000, the trial court held that motion to dismiss in abeyance, *lifted* the stay on discovery, and ordered the parties to conduct and complete discovery. Indeed, a discovery order was issued that same day (August 17, 2000) — signed by Levy's counsel — scheduling depositions and document discovery. (*See* Appendix, at p. 5a.) The trial court's August 17, 2000 Order also adjourned the return date for P&R's motion to dismiss to October 19, 2000 — one month *after* completion of discovery. Levy's only document requests in the underlying action sought a copy of the MetLife Agreement and all written communications between P&R and MetLife concerning Levy. (*See* Appendix, at pp. 1a-4a.) P&R subsequently produced all requested documents, and Levy never raised any objections to P&R's response. In addition, Levy deposed P&R's President, Anthony Paciello, on October 5, 2000. (R-81-119.)

Long after Levy had fully completed discovery, the trial court issued an Order dated May 13, 2001 which denied that portion of P&R's motion to dismiss pursuant to CPLR 3211(e), and converted P&R's 3211(a) motion to a motion for summary judgment. (*See* Appendix, at p. 7a.) Significantly, all parties were expressly permitted to submit additional affidavits in connection with the summary judgment motion. (R-6, R-15, R-136.) Levy thereafter submitted an attorneys' affirmation in opposition to the summary judgment motion. (R-136-147.) In his opposition papers, Levy did not even try to suggest that any additional discovery was needed, much less make a showing for additional discovery as required by CPLR 3212(f). (*Id.*)

Furthermore, the purported discovery that Levy falsely claims he was denied is utterly immaterial to the only issue on appeal — *i.e.*, whether P&R tortiously interfered with Levy's prospective business relationship with MetLife. The only items of discovery Levy now claims he was deprived of consist of the "relevant market place" and the economic consequences of Levy's inability to secure employment with MetLife. (*See* Levy's Petition, at p. 3) Those issues have no bearing on the issue relevant to Levy's appeal. The *only* issue on appeal was whether P&R's refusal to consent to a waiver of the MetLife Agreement was sufficient to sustain Levy's tortious interference claim.[6]

For Levy to now falsely suggest that he was somehow deprived of discovery that he never sought, and which is irrelevant in any event, is patently improper.

## 2. THE CASE WAS DECIDED IN ACCORDANCE WITH LONGSTANDING WELL-SETTLED PRINCIPLES OF NEW YORK STATE LAW

Although Levy recites general legal principles regarding the enforcement of restrictive covenants under New York law, he ignores the fact that the *only* claim he sought to reinstate on appeal was his New York State common law claim for tortious interference with prospective business relationship, based on P&R's refusal to grant a waiver of its agreement with MetLife.

---

6. Apart from the fact that Levy never sought any such information when he conducted discovery, despite having a full opportunity to do so, such evidence would only be relevant, if at all, to Levy's state and federal antitrust claims. Those claims were also dismissed by the trial court and Levy did not appeal the dismissal of those claims. Those claims were frivolous and properly abandoned.

New York law is well-settled that Levy's claim for tortious interference with a prospective business relationship cannot survive absent some evidence that P&R engaged in wrongful conduct. Levy failed to offer any evidence that P&R engaged in wrongful conduct of any kind, and the trial court correctly granted P&R's motion for summary judgment. In its unanimous affirmance, the First Department similarly recognized that there was no "wrongful" conduct in this case as a matter of law. Justice Braun's decision and the Appellate Division's affirmance were based on well established principles of New York law regarding tortious interference claims. *See, e.g., MLI Industries, Inc. v. New York State Urban Development Corp.*, 205 A.D.2d 998, 1000-01, 613 N.Y.S.2d 977, 980 (3d Dep't 1994) (defendant's actions to enforce its contractual rights cannot be considered wrongful or inherently tortious toward plaintiff); *Thur v. IPCO Corp.*, 173 A.D.2d 344, 569 N.Y.S.2d 713 (1st Dep't 1991) (dismissing tortious interference claim where employer threatened to enforce restrictive covenant, despite the fact that restrictive covenant might not be enforceable). *See also U.S. Reinsurance Corp. v. Humphreys*, 205 A.D.2d 187, 618 N.Y.S.2d 270 (1st Dep't 1994) (proposed tortious interference counterclaim based on letter sent by former employer to subsequent employer threatening to hold it responsible for damages was insufficient as a matter of law and properly rejected); *Bon Temps Agency Ltd. v. Greenfield*, 184 A.D.2d 280, 584 N.Y.S.2d 824 (1st Dep't 1992) (no claim for tortious interference where former employer sent letter to agency about to enter into contract with former employee warning against use of trade secrets).

There is absolutely nothing novel or unique about this relatively simple case warranting a Writ of Certiorari. There are no conflicts among New York State Courts regarding these basic legal principles and no federal questions are involved.

## 3. THERE ARE NO CONSTITUTIONAL ISSUES INVOLVED IN THIS CASE

Levy's desperation is further illustrated by his last-ditch effort to transform this case into a constitutional claim. P&R is not a state actor and Levy never before made any attempt to argue that he had a constitutional claim of any kind. *See San Francisco Arts & Athletics, Inc. v. U.S. Olympic Committee*, 483 U.S. 522 (1987). Nor did Levy ever assert a claim under 28 U.S.C. § 1983.

To the extent Levy is claiming that his constitutional rights were somehow violated by the trial court's dismissal of his complaint, or the Appellate Division's unanimous affirmance of that dismissal, his argument is misplaced. The sole issue before Justice Braun and the Appellate Division was whether there was a triable issue of fact as to whether P&R tortiously interfered with Levy's prospective business relationship with MetLife by refusing to waive a provision of the MetLife Agreement. Both the trial court and the First Department agreed that P&R's refusal to grant such a waiver was not "wrongful conduct" sufficient to support such a claim. Nothing in those rulings involve any constitutional rights of Levy or anyone else. Indeed, neither the trial court nor the First Department addressed the enforceability of the MetLife Agreement because it was immaterial to Levy's tortious interference claim. *See e.g.*, *Thur v. IPCO Corp.*, 173 A.D.2d at 345, 569 N.Y.S.2d at 713. (affirming dismissal of tortious interference claim based on letters to competitor threatening to enforce restrictive covenant, where conduct was not "wrongful" even if restrictive covenant were unenforceable).

Moreover, Levy never before asserted any claim based on constitutional principles, and cannot assert that unpreserved, untimely and legally deficient argument for the first time now. *See, e.g., Toure v. Avis Rent A Car Sys.*, 98 N.Y.2d 345, 351, 774 N.E.2d 865, 868 (2002).

## CONCLUSION

Based on the foregoing, P&R respectfully requests that Levy's petition for a Writ of Certiorari be denied in its entirety.

Respectfully submitted,

PETER L. ALTIERI
*Counsel of Record*
ROBERT D. GOLDSTEIN
EPSTEIN BECKER & GREEN, P.C.
*Attorneys for Respondents*
250 Park Avenue
New York, NY 10177-0077
(212) 351-4500

# APPENDIX

## APPENDIX A — NOTICE OF DISCOVERY AND INSPECTION DATED DECEMBER 13, 1999 AND LETTER FROM RICHARD O. HUGHES, ESQ. TO JUSTICE RICHARD F. BRAUN DATED NOVEMBER 29, 2000

**SUPREME COURT OF THE STATE OF NEW YORK**
**COUNTY OF NEW YORK**

Index No.:
118962/99

JAY L. LEVY, DDS,

Plaintiff,

-against-

P & R DENTAL STRATEGIES, INC. and
ANTHONY PACIELLO,

Defendants.

**NOTICE FOR DISCOVERY AND INSPECTION**

COUNSEL:

Pursuant to CPLR 3101 et seq. the plaintiff demands that you produce for inspection and copying at the offices of the undersigned, 217 Broadway, New York, New York 10007, Suite 309, on December 28, 1999 at 9:30 A.M., the following:

1. Contract dated December 24, 1998 between P & R Dental Strategies, Inc. and Met Life.

*Appendix A*

2. All written communications between P & R Dental Strategies, Inc. and Met Life concerning plaintiff.

Yours, etc.

**ALBERT & KAUFMAN, LLP**

By: s/ Morton Alpert
Attorneys for Plaintiffs
Office & P.O. Address
217 Broadway
New York, New York 10007
212-349-2000

Dated: New York, New York
December 13, 1999

TO: EPSTEIN BECKER & GREEN, P.C.
Attorneys for defendants
250 Park Avenue
New York, New York 10177

*Appendix A*

**Epstein Becker & Green, P.C.**
Attorneys at Law
250 Park Avenue
New York, New York 10177-1211
(212) 351-4500

November 29, 2000

The Honorable Richard F. Braun
Part 23, Room 320
80 Centre Street
New York, New York 10013

Re: Jay L. Levy v. P&R Strategies and Anthony Paciello
Index No.: 118962-99

Dear Justice Braun:

We represent defendants P&R Dental Strategies and Anthony Paciello (collectively "defendants") in the above-captioned matter. We respectfully request that defendants' pending motion to dismiss be returned to the calendar and that the Court consider the merits of the motion accordingly.

The procedural history of the pending motion is as follow. On May 18, 2000, defendants moved for an Order dismissing plaintiff's claims based on documentary evidence and on plaintiff's failure to state a claim. On August 17, 2000, the Court withheld judgment on the motion and ordered the completion of certain discovery, including party depositions, and scheduled a compliance conference for October 17, 2000. At the October 17 conference, plaintiff requested, and

received, a further adjournment until November 16, 2000, to supplement its opposing papers with additional facts purportedly gleaned from the completed discovery. (See attached Compliance Conference Order.)

As of today, plaintiff has not submitted any additional opposing papers. Defendants, on the other hand, need not submit further papers because their position remains unchanged from their original motion to dismiss; that is, plaintiff's claims fail as a matter of law and the Court-ordered discovery has not produced any new facts upon which plaintiff may rest his claims.

Discovery is now complete. Plaintiff has had a full opportunity to supplement his pleadings (and has chosen not to). Defendants respectfully request that the Court assign the earliest return date convenient to the Court.

Very truly yours,
s/ Richard O. Hughes
Richard O. Hughes

cc: Robert Goldstein, Esq.
Morton Alpert, Esq.
Dr. Anthony Paciello

# APPENDIX B — COMPLIANCE CONFERENCE ORDER

FM. T5-13a

Rev. (2/1/93)

**SUPREME COURT, COUNTY OF NEW YORK**

**INDIVIDUAL ASSIGNMENT PART (OR JUSTICE)** _____

JAY L. LEVY
**Plaintiff(s),**

**-against-**

P & R DENTAL STRATEGIES AND ANTHONY PACIELLO
**Defendant(s),**

**Index No.** 118962-99

COMPLIANCE

~~PRELIMINARY~~ **CONFERENCE ORDER**

(**202.8 and 202.12 of the Uniform Rules)

**APPEARANCES**
**Plaintiff(s):** MORTON ALBERT

**Defendant(s):** RICHARD HUGHES

It is hereby ORDERED that disclosure shall proceed as follows:

(1) **Insurance Coverage:** If not already provided, shall be furnished by _____ on or before _____.

(2) **Bill of Particulars:**
(a) Demand for a bill of particulars shall be served by _____ on or before _____.
(b) Bill of particulars shall be served by _____ on or before _____.
(c) A supplemental bill of particulars shall be served by _____ as to Items _____ on or before _____.

(3) **Medicial Reports and Authorizations:**
Shall be served as follows: _____

(4) **Physical Examination:**
(a) Examination of _____ shall be held _____
(b) A copy of the physician's report shall be furnished to plaintiff within _____ days of the examination.

(5) **Depositions:** Depositions of
[ ] Plaintiff(s) [ ] Defendant(s) [✓] All Parties shall be held SEPT. 27, 2000 AT 10:00 A.M. AT DEFTS ATTYS OFFICE, DEF TO BE DEPOSED FIRST.

(6) **Other Disclosure:**
(a) All parties, on or before _____, shall exchange names and addresses of all witnesses, statements of opposing parties and photographs, or, if none, provide an affirmation to that effect.
(b) Authorization for plaintiff(s)' employment records for the period _____ shall be furnished on or before _____.
(c) Demand for discovery and inspection shall be served by _____ on or before _____.
The items sought shall be produced to the extent not objected to, and objections, if any, shall be stated on or before _____.
(d) Other [interrogatories, etc.] _____

BEST AVAILABLE COPY

*Appendix B*

FM. 1S-13b Rev. (2/1/93)

(7) End Date for all Disclosure [must be within 12 months]: SEPT. 29, 2000

(8) Impleader: Shall be completed on or before —

(9) Motions: Any dispositive motion(s) shall be made on or before PENDING MOTION TO DISMISS COMPLAINT ADJOURNED TO OCT. 19, 2000

(10) Note of Issue: Plaintiff shall file a note of issue/certificate of readiness on or before OCTOBER 20, 2000. A copy of this stipulation and order, an affirmation stating that the terms of the stipulation and order have been complied with, and an affidavit of service of the affirmation and note of issue shall be served and filed with the note of issue on or before said date.

(11) If a motion relating to disclosure has raised additional disclosure issues, the parties agree as follows:

(12) Compliance conference shall be held on OCTOBER 17, 2000, 11:00 A.M.

Failure to comply with any of these directives may result in the imposition of costs or sanctions or other action authorized by law.

SO ORDERED:

J.S.C.

Dated: 9/7/00

A PENALTY SHALL BE IMPOSED FOR ANY NON-COMPLIANCE, UNLESS GOOD CAUSE IS SHOWN THEREFOR.

D-452d

**ADDITIONAL DIRECTIVES**

In addition to the directives set forth on the annexed pages, it is further ORDERED as follows:

DEFENDANTS SHALL COMPLY WITH ALL DOCUMENT DISCOVERY REQUESTS OF PLAINTIFF AS DESCRIBED IN THE PRELIM. CONF. ORDER OF MARCH 14, 2000 AND PRIOR D/I NOTICES, ALL ~~outstanding~~ BY SEPTEMBER 8, 2000.

Dated: 9/7/00

SO ORDERED:

PROOF OF THE FILING OF A NOTE OF ISSUE WITH THE TRIAL SUPPORT OFFICE SHALL BE FILED WITH THE CLERK OF PART 23

# APPENDIX C — SHORT FORM ORDER DATED MAY 13, 2001

1



STRUCTURAL COPY

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. RICHARD F. BRAUN J. Justice PART 1A Part 23

Jan Lenk, DDS

-v-

PTR Dental Strategies et al.

INDEX NO. 116542/99

MOTION DATE 2/1/01

MOTION SEQ. NO. 003 (Pltf-mot-seq)

MOTION CAL. NO.

The following papers, numbered 1 to 2 were read on this motion to/for dismiss

| PAPERS NUMBERED |
|---|
| Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits ... 1 |
| Answering Affidavits — Exhibits |
| Replying Affidavits |

FILED
MAY 30 2001
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is denied as to the branch under CPLR 3211(a)(1) because that ground was waived (CPLR 3211(e)), and the branch of the motion under CPLR 3211(a)(7) is converted to a motion for summary judgment, of which the parties are notified pursuant to CPLR 3211(c) (Rubin v Liotta, 56 NY2d 276, 278-279 (1982)), and it is further

ORDERED that the parties may serve any supplemental affidavits on the converted motion on or before May 31, 2001, and it is further

ORDERED that the parties shall appear before the Court on the scheduled converted motion on June 7, 2001 at 9:30 AM.

ENTER:

Dated: New York, New York, May 13, 2001

Richard F. Braun
J.S.C.

JUSTICE

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION